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No. 91-38

In the Supreme Court of the United States

OCTOBER TERM, 1991

LINUS P. ROMEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The trial judge allowed the victim, the eight-year-old alleged victim of sexual abuse, to testify in response to some questions by whispering her answers to questions into her mother's ear. The mother then related her daughter's answers. The question presented is whether this manner of presenting the testimony of the child witness violated the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 32 M.J. 180. The opinion of the Army Court of Military Review, Pet. App. 10a-15a, is reported at 29 M.J. 795.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 11, 1991. The petition for a writ of certiorari was filed on July 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Ord, California. He was convicted of sodomizing and indecently assaulting his eight-year-old daughter, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. Petitioner was sentenced to confinement for 20 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. During a five-month period beginning in January 1988, petitioner was the sole caretaker of his daughter and his five-year-old son. During that period, petitioner repeatedly forced his daughter to perform various acts for his own sexual gratification. Pet. App. 2a-3a; Tr. 140-141, 164-168, 171-172.

At trial, the government called three witnesses: a physician, petitioner's wife, and petitioner's daughter. Doctor Edward Dumontier, a family practitioner, testified that he examined petitioner's daughter after her mother discovered a rash around the girl's anus. Tr. 115. Petitioner's daughter told Dr. Dumontier that "no one except daddy" had touched her in the area of the rash. Tr. 119. Dr. Dumontier determined that the rash was of a type that is usually caused by skin-to-skin contact and, when present in the genital area, usually by sexual activity. Tr. 120.

Before calling petitioner's daughter to the stand, the prosecutor told the trial judge that the girl was reluctant to talk about the offenses. Tr. 148. Previously, the prosecutor said that the girl had relayed information to him and the Article 32 investigating officer by writing her answers

or by whispering her answers to her mother who would then repeat what the girl said. Tr. 148.[1] The prosecutor expressed his concern that petitoner's daughter would again refuse to talk about the charged incidents and indicated that someone might have to relate her whispered responses. Tr. 148-149.

When called to testify, petitioner's daughter answered many preliminary questions, Tr. 152-160, but she refused to discuss aloud her father's sexual misconduct. Tr. 161. Asked if she wanted to whisper her answers in her mother's ear, petitioner's daughter nodded yes. Tr. 161. The trial judge directed the trial counsel to try to get petitioner's daughter to answer questions aloud. Tr. 161. Again, however, she declined to answer the questions. Tr. 162. Finally, the trial judge directed the girl's mother to sit next to her and "repeat what the trial counsel says and then repeat exactly what your daughter says, without any other words." Tr. 163. The trial judge advised Mrs. Romey to act "strickly [*sic*] [as] an interpreter," and had the prosecutor administer the interpreter's oath to her. Tr. 166.

On direct examination, petitioner's daughter answered some questions on her own, but she answered most of the questions through her mother. On her own, she answered in the affirmative when asked whether petitioner showed her how to touch his penis, Tr. 166; she said that she touched petitioner's penis with her fingers, Tr. 169; and she demonstrated that she held petitioner's penis in a "semi-closed fist," Tr. 171. On cross-examination and recross-examination, she responded to approximately 70

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[1] Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing that is conducted in the civilian criminal justice systems to determine whether there is probable cause to hold a defendant for trial.

questions directly, while answering six questions through her mother. Tr. 172-179, 181-186.

During the sentencing portion of the court-martial, Mrs. Romey testified on petitioner's behalf, urging the court members to be lenient. Tr. 282-284.

2. Before the court of military review petitioner claimed, as he did at trial, that his wife's service as an interpreter violated his Sixth Amendment right to confront his daughter. The court unanimously rejected that claim. Pet. App. 10a-15a. The court found that the procedure afforded petitioner the right physically to confront his daughter throughout both direct and cross-examination "in clear view of the court members." Pet. App. 13a-14a. Addressing the absence of a specific finding that the mother's assistance was required, the court reasoned that the trial judge's "directions to the trial counsel and questioning of [petitioner's daughter] indicate that he proceeded with the objected to method only after concluding that [petitioner's daughter] would not be able to testify without her mother." *Id.* at 14a. The court found that this conclusion was "supported by the evidence of record." *Ibid.*[2] Finally, the court found "no reason to believe that Mrs. Romey's 'interpretation' was inaccurate or that she was biased." *Id.* at 15a.

3. The Court of Military Appeals also unanimously affirmed. Pet. App. 1a-9a. The court agreed that the trial judge "impliedly made" a finding that Mrs. Romey's assistance was necessary and cited five facts that, in the court's view, safeguarded the reliability of the procedure. First, Mrs. Romey did not witness the charged offenses and also did not give substantive testimony against her husband. In fact, the court noted, she testified for the

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[2] Courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c).

defense at sentencing. Second, there was no evidence that Mrs. Romey engaged in any "extortious conduct" toward petitioner. Third, petitioner did not challenge the accuracy of Mrs. Romey's retelling of her daughter's testimony. Fourth, Mrs. Romey took the interpreter's oath. Finally, Mrs. Romey's responses were "largely cumulative of the responses which [petitioner's daughter] eventually managed to make * * * without use of the interpreter procedure." The court concluded: "We find no unreliability or true unavailability for cross-examination or denial of due process in this context." Pet. App. 6a-7a.

ARGUMENT

Petitioner contends that he was denied a fair trial when the trial judge allowed petitioner's wife to act in a role similar to that of an interpreter because the trial judge did not expressly find that it was necessary to use this procedure in order to enable petitioner's daughter to testify.

1. There is no conflict among the circuits on the question presented by this case. The procedure at issue here has been used infrequently, and none of the reported federal or state cases has held that either the Confrontation Clause or the Due Process Clause invariably prohibits using a victim's relative as an interpreter. Instead, recognizing that a trial judge has discretion whether to appoint an interpreter, *Perovich* v. *United States*, 205 U.S. 86, 91 (1907); *e.g.*, Fed. R. Crim. P. 28, the federal and state courts have examined the facts of each case to determine whether there was an undue risk that the interpreter would be biased due to his or her relationship with the victim or witness. See, *e.g.*, *Fairbanks* v. *Cowan*, 551 F.2d 97 (6th

Cir. 1977) (upholding appointment of the victim's father as an interpreter for the victim, a 31-year-old man with the mentality of a six-year-old, who was able to utter "only gutteral sounds" due to a speaking impairment); *United States* v. *Addonizio,* 451 F.2d 49, 68 (3d Cir. 1971) (upholding appointment of the witness's wife as an interpreter for the witness, who was in a hospital and "unable to speak above a loud mumble"), cert. denied, 405 U.S. 936 (1972); *Prince* v. *Beto,* 426 F.2d 875 (5th Cir. 1970) (finding a due process violation where the interpreter, who was the husband of the victim of a burglary and attempted rape, attempted to extort money from the defendant before trial in return for ending the case); *Lujan* v. *United States,* 209 F.2d 190, 192 (10th Cir. 1953) (upholding appointment as an interpreter of a person who was a relative of government witnesses); *Almon* v. *State,* 21 Ala. App. 466, 109 So. 371 (1926) (upholding appointment of the rape victim's mother as an interpreter for the victim, who had a speech disability); *State* v. *McLellan,* 56 N.C. App. 101, 286 S.E.2d 873 (1982) (upholding appointment of the victim's half-sister as an interpreter for the victim, who had a speech disability).

2. Contrary to petitioner's claim, the procedure used at trial did not violate the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause guarantees a defendant the right to confront and cross-examine a witness against him. See, *e.g., Coy* v. *Iowa,* 487 U.S. 1012 (1988); *Pennsylvania* v. *Ritchie,* 480 U.S. 39, 51 (1987); *Delaware* v. *Fensterer,* 474 U.S. 15, 18-19 (1985). Petitioner was afforded both protections. His daughter testified in the presence of petitioner, the court-martial panel members, the trial judge, and defense counsel. Tr. 155-186. During the government's direct examination, petitioner's daughter answered some questions personally and some through her

mother. During cross-examination, she replied personally to all but one of defense counsel's questions. Tr. 174-178. During recross-examination, she testified personally in response to nearly all of the defense questions. Tr. 181-186. When petitioner's daughter did not personally answer questions, she responded by whispering her answers to her mother, who then repeated the answers to the panel. The court-martial panel members therefore had an opportunity to assess the demeanor of petitioner's daughter. Mrs. Romey, who was sworn as an interpreter, was specifically instructed to repeat only the questions asked of and the answers given by her daughter. Tr. 166. The defense did not challenge the accuracy of Mrs. Romey's repetitions at trial, and the military appellate courts found no reason to believe that Mrs. Romey's repetitions were inaccurate or biased. Finally, petitioner was not limited in the scope or nature of his cross-examination. See *Delaware* v. *Fensterer*, 474 U.S. at 18-19 (Confrontation Clause requirements are met when the defense has a full and fair opportunity to probe and expose the infirmities in a witness's testimony). Accordingly, petitioner had a full and fair opportunity physically to face and cross-examine his accuser.

Relying on *Maryland* v. *Craig*, 110 S. Ct. 3157 (1990), petitioner maintains that the procedure used in this case violated the Confrontation Clause because the trial judge did not expressly find that the procedure was necessary to enable petitioner's daughter to testify. This case, however, is materially different from *Craig*. There, the defendant was denied the opportunity for a face-to-face confrontation with one of his accusers. The issue in *Craig* was whether the use of a one-way closed circuit camera to enable a juvenile to testify out of the presence of the defendant, the jury, and the trial judge violated the Con-

frontation Clause.[3] This Court concluded that denying a defendant the right physically to confront a witness against him did not violate the Confrontation Clause if the trial judge found that that using such a procedure was necessary to ensure that the child witness could testify and if the alternative procedure chosen was reliable. 110 S. Ct. at 3166-3170. Unlike Craig, petitioner was not denied the opportunity to confront his accuser face-to-face, so this Court's decision in *Craig* does not govern this case. In any event, the trial judge in this case implicitly found that it was necessary to use the procedure followed here in order to enable petitioner's daughter to testify. Accordingly, the procedures used in this case would not have run afoul of the rules set forth in *Craig,* even if that case were controlling.

Before petitioner's daughter testified, the prosecutor told the trial judge that the girl was reluctant to talk about the charged incidents. Tr. 148-149. The prosecutor also indicated that, in the past, the girl had communicated information about the incidents either in writing or by whispering to her mother. Tr. 148. The trial judge then conducted a preliminary examination of petitioner's daughter outside the presence of the court-martial panel members. Tr. 150-155. During this session, he found that she was competent to testify. After the panel members were recalled, petitioner's daughter testified freely on collateral matters. Yet when she was questioned formally about the charged offenses, she became very quiet. When asked, "What are we going to talk about [today]?", she failed to respond. Tr. 161. When asked if she would like to talk through her

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[3] The prosecutor, defense counsel, and child witness withdrew to another room where the child was examined and cross-examined. The judge, jury, and defendant remained in the courtroom where the child's testimony was displayed. 110 S. Ct. at 3158-3159.

mother, she indicated that she would. *Ibid.* The trial judge then asked the girl whether she could answer any questions without her mother. Again she did not reply. The trial judge then directed the prosecutor to continue to try to question petitioner's daughter without the aid of her mother. When the prosecutor's subsequent efforts proved futile, the trial judge allowed the use of Mrs. Romey to relay her daughter's whispered answers to the questions. Tr. 162.

The record therefore demonstrates that the trial court satisfied its obligation to hear the evidence and determine the girl's need for special protection and assistance. While the trial judge did not expressly state his reason for allowing Mrs. Romey to act as an interpreter, the judge did so implicitly. The judge's directions to the prosecutor and questions to petitioner's daughter indicate that he proceeded with this alternative method only after concluding that the girl was too embarrassed to testify without her mother. While *Craig* requires the trial judge to find based on the record evidence that it is necessary to deny a defendant physical confrontation before a substitute procedure may be used, *Craig* does not require a trial judge to utter any specific or "magic words" in order to satisfy constitutional requirements.

3. Petitioner further emphasizes that the procedure used in this case is inherently suspect and likely to lead to unjust convictions, since it allows an interpreter to modify the witness's testimony. In this regard, petitioner contends that it is fundamentally unfair to permit the mother of an alleged victim of child abuse to serve as an interpreter for the child. Whatever concerns the procedure may raise in other cases, it was not unfair in this one. After carefully examining the record, both military appellate courts found no evidence that Mrs. Romey's recountings of the girl's answers were inaccurate; in fact, both courts cited circumstantial evidence to the contrary. Pet. App. 7a, 15a. Mrs.

Romey was used as an interpreter for her daughter only when it was apparent that the girl was too traumatized to testify without her mother. Mrs. Romey was sworn as an interpreter and specifically instructed to repeat only the questions asked and the answers given. Mrs. Romey was not an eyewitness to the charged offenses. Although she briefly testified for the government at the guilt stage of the case, simply to identify her daughter and to describe how her daughter's injuries first came to her attention, Tr. 139-147, Mrs. Romey testified on petitioner's behalf at sentencing, Tr. 282-284.[4] Finally, the defense did not challenge the accuracy of Mrs. Romey's reiterations at trial, and petitioner's failure to raise a claim of prejudice at trial substantially undermines his present claim. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988). Under these circumstances, further review of petitioner's claim is not warranted.

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[4] Mrs. Romey's testimony at sentencing demonstrated that she was interested in continuing her marriage and preserving her family. She testified that she wanted her husband to receive counseling, did not believe that he would repeat the conduct, and felt that it was important for her two children to have their father available. Tr. 282-284.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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